

OUTLINE OF CIVIL FRAUD

I. Introduction

A. Authority to bring civil fraud action

only the Attorney General has authority to initiate, compromise, or close claims involving fraud against the United States

1. the Civil Division has authority over fraud claims where single damages and penalties are over \$1,000,000
2. automatic delegation to U.S. Attorney's Office where single damages are less than \$1,000,000. Cases may be handled above that amount on a supervised basis.

B. Administrative handling of fraud matters

1. Program Fraud Civil Remedies Act (31 USC § 3801)
 - allows agencies to administratively obtain damages for fraud
 - need permission of Department of Justice
 - can be used for fraud where damages are less than \$150,000
 - up to double actual damages and forfeitures up to \$5,000 per false claim
 - dispute decided by administrative law judge; review by district court
 - can subpoena records as part of investigation
2. administrative remedies for inflated Defense contract claims under Department of Defense Authorization Act of 1986 (10 USC § 2324)

3. Civil Monetary Penalties Law (42 USC § 1320a)

administrative remedies by Department of Health and Human Services for false Medicare and Medicaid claims - up to treble damages and up to \$10,000 for each false service.

4. Contract Disputes Act (41 USC § 604)

- Contract Disputes Act governs disputes between contractor and contracting officer. Contracting officer is to decide all disputes. Contractor can then appeal ruling to a board of contract appeals or the U.S. Court of Federal Claims.
- Contract Disputes Act explicitly states that contracting officer cannot rule on or compromise any claims where fraud is alleged. 41 USC § 605(a).

II. Civil Remedies

A. False Claims Act (31 USC § 3729-33)

Generally, the False Claims Act provides for damages against one who submits false claims to the Government, causes false claims to be submitted to the Government, or makes false statements to the Government.

1. who can be sued

- individuals
- corporations - liable for the acts of their employees
- partnerships

2. nature of a claim

Any claim for payment or transfer of Government funds or property, including:

- a. invoices for payment on a contract
- b. application for a loan
- c. claims arising from loan guarantees

examples: false claim

- 1) invoice for inflated number of goods
- 2) uses substitute materials but submits invoice as if in compliance with contract
- 3) reverse false claim (§ 3729(a)(7)) statement to decrease payment to Government

false statement

- 1) defective pricing
- 2) false statement on loan application

causes false claim to be submitted

- 1) subcontractor on procurement
- 2) Medicare fraud
- 3) false application on guaranteed loan
- 4) collusive bidder

3. knowingly presents a false claim

- a. has actual knowledge or
- b. acts in deliberate ignorance of the truth or falsity or
- c. acts in reckless disregard of the truth or falsity

no specific intent required

compare with criminal law requirement of mens rea

4. knowledge of the falsity by the Government

knowledge by Government officials may not defeat False Claims Act liability

5. statute of limitations

- a. within 6 years of violation or
- b. within 3 years of when we learned about violation but
- c. never more than 10 years

6. damages

- a. formula - amount paid minus the value of that received.
- b. treble actual damages
 - if restitution made; first treble damages and then reduce by amount of restitution (come clean provision -notify U.S. within 30 days of learning of fraud; double damages plus our costs)
 - the law is uncertain as to whether we can obtain consequential damages under the False Claims Act. U.S. v. Aerodex, 469 F.2d 1003 (5th Cir. 1972) says we cannot, but states that we can recover consequential damages under breach of warranty or contract causes of action. Other cases indicate that we are entitled to our natural and proximate damages.
- c. civil penalty of \$5,000-\$10,000 for each false claim
 - where false invoices from subcontractor to prime contractor, count invoices from sub to prime, not prime to U.S. U.S. v. Bornstein, 423 U.S. 303 (1976)
 - amount of penalties may be limited by court pursuant to the Excessive Fines Clause

Note: we can seek penalties even if there are no actual or provable damages

7. Types of cases

- a) items billed but not delivered
- b) product substitution
- c) product testing
- d) mischarging
- e) front loading progress payments
- f) bid rigging
- g) federal loans and insurance
- h) contract eligibility

- i) defective pricing
 - 1) cost or pricing data
 - 2) discount and marketing data
 - negotiated contracts for commercially available items
 - certify to lowest prices available

8. Qui tam provisions - whistleblower suits

- a) can't be based only on public knowledge obtained through Government hearing, investigation, or report unless relator is an original source
- b) courts generally have ruled that Government employees can file qui tam suits; less clear whether investigators and auditors can file qui tam suits
- c) relator files complaint under seal and provides complaint and written disclosure statement of facts to Attorney General and U.S. Attorney
- d) we then have 60 days to investigate and make decision whether to intervene
- e) we can seek extensions
- f) if we intervene, we take charge
- g) if we decline, relator continues suit
- h) relator gets a percentage of any recovery
 - 15-25% if we intervene
 - 25-30% if we decline
 - reduced percentage if relator was involved in the fraud
- i) even if we decline, settlement requires our consent

B. Additional remedies and causes of action

1. common law fraud

a. elements

- 1) a material representation by defendant
- 2) the representation must be false
- 3) the representation must be made with knowledge of its falsity or with reckless disregard for its truth
- 4) the representation must be made with the intention that plaintiff act upon it
- 5) plaintiff has relied and has been damaged as a result

b. damages

single damages plus punitive damages and consequential damages

c. statute of limitations

three years from act complained of or three years from when official with responsibility to act knew or reasonably could have known of the right of action

2. breach of contract

a. elements

- 1) a contractual obligation
- 2) a failure to perform
- 3) damages resulting from that failure

b. damages

single damages plus consequential damages

c. statute of limitations

six years from the breach or six years from when an official with responsibility to act knew or reasonably could have known of the breach

3. unjust enrichment/payment under mistake of fact

these are equitable principles based upon the unfairness of having someone retain possession of money or property to which he is not entitled

damages and statute of limitations are the same as for breach of contract claims

4. bribery and conflict of interest

the United States may seek recovery for bribery and conflict of interest from both the payor and payee of the bribe. Suit against the payor is under a common law fraud theory. Suite against the payee is for breach of an implied contractual relationship under common law breach of contract. There is a rebuttable presumption that the United States was damaged in the amount of the bribe.

5. other common law damages

a. recovery of all amounts paid under contract - U.S. v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); K&R Engineering Co. v. U.S., 616 F.2d 469 (Ct. Cl. 1980)

b. profits

c. rescission of contract
U.S. v. Acme Process Equipment Co., 385 U.S. 138 (1966)
- Anti-kickback case Pan Am Petroleum & Transportation Co. v. U.S., 273 U.S. 456 (1927) - U.S. did not have to provide compensation for benefits conferred

6. Anti-kickback Act of 1986 (41 USC § 51)

kickbacks to primes from subcontractors on cost type contracts

7. Section 5 of Contract Disputes Act (41 U.S.C. § 604)

if a contractor cannot support a claim and it is attributable to misrepresentation of fact or fraud, the contractor is liable for an amount equal to such unsupported part of the claim plus the cost of reviewing the claim.

C. obtaining assets

1. Federal Debt Collection Procedures Act (28 USC § 3001)

sets standard federal procedures for debt collection

pre-judgment - can file suit and seek court order seizing property (must show proper need); defendant may not be told until after property is seized

2. civil forfeiture pursuant to 18 USC § 981

assets must be tied into money laundering

III. Civil-Criminal Coordination

A. criminal statutes most related:

18 U.S.C. § 286 - conspiracy to file false claims
18 U.S.C. § 287 - filing false claims
18 U.S.C. § 371 - conspiracy to defraud the U.S.
18 U.S.C. § 1001 - use of false statements

B. Differences with criminal law

- burden of proof - civil is preponderance of the evidence; criminal is beyond a reasonable doubt
- statute of limitations - discussed above
- discovery - federal rules - depositions; documents
- knowledge vs. intent

C. Need for coordination

(Attorney General's Memorandum of July 16, 1986)

- civil vs. criminal discovery
- collateral estoppel effect of criminal conviction
- access to grand jury materials

IV. Investigative tools

A. General program reviews, audits

B. IG subpoenas

C. Civil Investigative Demands

- authorized by 31 USC § 3733
- can seek documents, get written answers to interrogatories, or take depositions
- must be in support of potential False Claims Act suit
- must be signed by the Attorney General
- investigation done by "false claims law investigator"
can be DOJ lawyer, investigator
- results can't be shared with agency

D. Grand Jury materials

U.S. v. Sells Engineering, 463 U.S. 418 (1983) and U.S. v. Baggot, 463 U.S. 476 (1983)

access to civil attorneys is limited by Criminal Procedure Rule 6 (e)

to get access, we must show particularized need

- a) needed to avoid a possible injustice in another proceeding
(must be to assist in preparation or conduct of another judicial proceeding)
- b) need for disclosure outweighs need for continued secrecy
- c) request covers only materials needed

we must show more than inconvenience and cost savings

it is easier to get documents than testimony documents
produced to a grand jury pursuant to a subpoena may not
be subject to Rule 6(e)

V. Referral to the Civil Division

A. Statute of limitations

- when did the acts occur
- when did we find out
- who found out

- when were the claims submitted
- B. Wrongful acts
 - what were the false claims/statements
 - how was the government defrauded
- C. How did the programs operate
- D. Damages
 - are there any
 - how were they determined
 - if no actual damages, are there illegal profits
 - bribery, kickbacks
- E. How many false statements/claims
- F. Defendant's financial status (collectability)
 - corporation/individual
 - are assets being concealed
 - are assets being dissipated
- G. Evidence
 - documents - government, defendant, others
 - interviews
 - audits, investigative reports
- H. Other possible defendants

QUI TAM PROBLEMS

I. In General: Relations With Relators

A. Meeting with the relator before the qui tam complaint is filed

1. Advice regarding the merits of the claim
2. Advice regarding procedures
3. Assurances:
 - original source
 - criminal exposure of relator
 - criminal investigation/prosecution of anyone
 - immunity
 - share of recovery
4. Employment claims; pending state or federal litigation
5. The unrepresented relator; advice about counsel

B. Relations after relator files the qui tam complaint

1. Initial briefing
2. Investigation
3. Maintaining secrecy
4. Protecting investigative/government information
5. Employment litigation: potential interference with qui tam

C. The intervention decision; unadopted claims

II. The Relator As Employee/Insider Of The Qui Tam Defendant

- A. Can you use materials given to you by the relator, which he has stolen?
- B. Can you use tapes obtained by the relator in violation of state law?
- C. Can you use materials given to you by the relator which he takes from the defendant at your suggestion?
- D. What use can you make of information obtained by the relator (a high-level manager) concerning the defendant's defense of the investigation and suit; other privileged information such as internal investigation materials?

III. The Investigation

A. The seal

- B. Extensions of time

IV. Litigation

- A. Discovery
- B. Motion practice
- C. Trial

V. Settlement

- A. Getting the relator on board
- B. "Inability to pay" settlements -- sharing defendant's financial information with the relator
- C. Press/Confidentiality terms; terms relating to relator's future cooperation
- D. The criminal side of the house
- E. Defendant/relator settlements in declined cases; cases in which U.S. has intervened

VI. The Relator's Share

- A. How to decide
- B. Who decides
 - 1. Role of AUSA
 - 2. Role of DOJ
 - 3. Input from defendants
 - 4. Input from relator
- C. What happens if no consensus is reached